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In the Supreme Court of the United States

OCTOBER TERM, 1978

MARIO RAINONE AND ROCCO CIRCELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 8a-16a) is reported at 586 F. 2d 1132. The opinion of the district court (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1978. A petition for rehearing was denied on December 19, 1978 (Pet. App. 17a). The petition for a writ of certiorari was filed on January 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the limited weapons search of petitioners' automobile was justified under the principles of *Terry* v. *Ohio*.

STATEMENT

An indictment filed in the United States District Court for the Northern District of Illinois charged petitioners with possession of an unregistered dynamite bomb, in violation of 26 U.S.C. 5861(d), and conspiracy to possess the bomb and to use it to destroy a building used in an activity affecting interstate commerce, in violation of 18 U.S.C. 371. The district court granted petitioners' pretrial motion to suppress (Pet. App. 1a-7a). The court of appeals reversed (Pet. App. 8a-16a).

The facts adduced at the suppression hearing show that at approximately 3:00 a.m. on January 17, 1978, two local police officers were driving down a side street in West Chicago, Illinois. They saw an automobile with its headlights off moving very slowly through a parking lot next to a restaurant. The restaurant was closed, and, except for some illumination from a nearby used car lot, the parking lot was dark (Tr. 15-18, 31-32, 42-43, 52-54, 68-69).[1] The officers drove into the parking lot to investigate, followed by another officer who had been cruising the area in a squad car (Tr. 18-19, 54-55, 73). The three officers left their vehicles and approached the automobile. They asked petitioners to identify themselves and to explain their presence in the parking lot. Although both supplied their names, petitioner Rainone was unable to produce any identification and petitioner Circelli produced only a traffic citation bearing his name (Tr. 24, 57-60, 75). Petitioner Rainone told the officers that he was related to the owner of the restaurant (Tr. 75, 103).[2] At that point, one of the officers told the other two that

[1] "Tr." refers to the transcript of the April 4, 1978, suppression hearing.

[2] Petitioner Rainone's explanation was subject to some dispute. According to one of the officers, petitioner Rainone explained that he and petitioner Circelli were supposed to meet the owner in the parking lot at 2:45 a.m. (Tr. 75). Petitioner Rainone, by contrast, maintained that he told the officer that he and Circelli had driven by the restaurant on their way home and entered the parking lot to see whether his uncle, who often worked late, was still there so that Rainone could show Circelli the restaurant (Tr. 103-104).

the owner of the restaurant was involved in an intra-family feud marked by threats of violence and warned that in light of those circumstances petitioners might be dangerous (Tr. 76-77). Upon request, petitioners got out of the car and were subjected to pat-down searches. No weapons were discovered (Tr. 24-27, 61-64, 77). Before allowing petitioners to re-enter the automobile, one of the officers looked into the car, quickly scanning the front and rear seats and the front floor (Tr. 65). Seeing nothing, he placed his hand under the front seat and felt an object that he believed to be a bludgeon or club (Tr. 79-80). He removed the object, which proved to be two sticks of dynamite and a fuse (Tr. 49-51, 65, 80-81). Petitioners were then arrested (Tr. 81).

2. Petitioners moved to suppress the evidence seized from the automobile on a variety of grounds. The district court found that the circumstances justified the investigatory stop of the vehicle, the request that petitioners get out of the car, and the subsequent pat-down search (Pet. App. 4a). The district court held, however, that the limited search of the automobile was unlawful (Pet. App. 7a). It therefore granted petitioners' motions to suppress the dynamite discovered in the course of that search (*ibid.*).

The government appealed, and the court of appeals reversed. It held that the scope of a legitimate *Terry* search may be extended to include areas within the immediate control and ready access of the detained suspect. Because the search in this case was confined to such an area, the court held that it was reasonable under the rationale of *Terry* (Pet. App. 16a).

ARGUMENT

1. The judgment of the court of appeals is not final. The petition challenges not a conviction, but merely the court of appeals' reversal of the district court's pretrial suppression order. That reversal, however, places petitioners in the same position that they would have been in if the district court had ruled against them in the first instance. Since such a ruling would not have been subject to interlocutory appeal (see *DiBella* v. *United States*, 369 U.S. 121, 124 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940)), review of the court of appeals' decision at this time would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed on appeal, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment against them.

2. In any event, the court of appeals correctly determined that the limited search of the automobile was justified under the circumstances of this case.

The district court properly concluded (Pet. App. 4a-5a) that the circumstances justified the initial investigatory stop of the automobile (see *Adams* v. *Williams*, 407 U.S. 143 (1972); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975)), the request that petitioners step out of the car (see *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977)), and the pat-down search of their persons (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Petitioners do not challenge the validity of those rulings. Instead they argue only (Pet. 5-9) that after the frisk produced no weapons or probable cause to arrest, the scope of the protective search under the principles of *Terry* and its progeny could not be extended to the car.

As this Court observed in *Terry*, the justification for such a search "is the protection of the police officer

and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" (392 U.S. at 29). In *Terry*, the search was held lawful because it consisted solely of a pat-down of the outer clothing of the suspect and thus was "confined * * * strictly to what was minimally necessary to learn whether the men were armed * * *" (*id.* at 30). But, as the court of appeals properly noted (Pet. App. 16a), *Terry* searches are not "necessarily restricted to the outer clothing of the suspect." Rather, the precise limitation on such searches must "be developed in the concrete factual circumstances of individual cases." *Terry* v. *Ohio*, *supra*, 392 U.S. at 29.

In a sidewalk encounter with a pedestrian, such as that in *Terry*, the officer's need to determine the presence of dangerous weapons is fully satisfied by a frisk of the outer clothing of the suspect. Where the suspect is a motorist, however, a pat-down of his outer clothing may not be sufficient to assure the officer's safety. In such cases, a weapon may have been secreted in a part of the automobile readily accessible to the suspect. While the potential for danger is especially great where the suspect remains in the car, it is substantial even where he has been removed from it, since there is still a risk that he may harm the officer after returning to his vehicle.[3] See Pet.

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[3]A colloquy between the district court and one of the arresting officers in this case makes the point well (Tr. 78):

The Court:	Why did you decide to search the vehicle?
The Witness:	As a matter of routine, sir, before putting them back in the car.
The Court:	Routine, without any cause to believe there is anything in the vehicle, you searched it. You

App. 12a n.2. Thus, as the court of appeals correctly held (Pet. App. 12a-13a):

> [I]t is clear that the rationale of *Terry*—the protection of the investigating officer and others nearby—permits the officer to make a search of the automobile limited to what is minimally necessary to uncover weapons to which the suspect will have easy access.
>
> The scope of the search in the case before us was clearly restricted to these permissible limits. Officer Guzlas merely looked inside the car and placed his hands under the front seat. He did not open the trunk or the hood or look under the back seat or chassis. Further, Officer Guzlas removed the object from under the front seat only after determining that if felt like a weapon such as a billy club or night stick.

> don't have anybody who was fleeing from a crime. You don't have any evidence that a crime has been recently committed. You don't have any reason to believe that these are criminals. You don't have any reason to believe that they have any contraband in the car, and you pat them down, they don't have any weapons on them.
>
> You still go ahead and search every car you stop and somebody gets out, and you don't have any justification for being suspicious about anything?
>
> The Witness: Well, if I was suspicious enough for a pat-down, I continue my search for weapons into the immediate area of the driver and passenger for my own safety.
>
> It is nothing personal with the driver or passenger. Just no sense in me patting them down outside, and letting them get back into a weapon accessible once I turn my back.
>
> That is just a matter of survival, sir.

Cf. *United States* v. *Wilkerson*, No. 77-1932 (D.C. Cir. July 26, 1978), slip op. 8; *United States* v. *Santana*, 485 F. 2d 365, 368-369 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); *United States* v. *Green*, 465 F. 2d 620, 624-625 (D.C. Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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